

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

MILTON HENTZ

PLAINTIFF

V.

NO. 2:96CV196-B-B

THE KROGER COMPANY  
AND DARRYL M. BROWN

DEFENDANTS

**MEMORANDUM OPINION**

This cause comes before the court on the plaintiff's motion to dismiss or in the alternative to remand.<sup>1</sup> The court has duly considered the parties' memoranda and is ready to rule.

The plaintiff asserts, inter alia, that defendant, The Kroger Company [Kroger], failed to remove this action to the proper division. The notice of removal repeatedly refers to the Western Division; the Delta Division is the proper division. The notice reads in part: "you are hereby notified that Defendant, The Kroger Company, has removed this action...to the United States District Court for the Northern District of Mississippi, Western Division." The notice requests the court to assume jurisdiction and issue all necessary orders and process to remove said action to "the United States District Court for the Northern District of Mississippi, Western Division."

The defendant contends that "divisional venue has been abolished in the federal courts, and even if the action was removed

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<sup>1</sup>This action arises out of an automobile accident which occurred while the plaintiff was employed by the Mississippi Department of Transportation, a division of the Mississippi Transportation Commission [MTC]. The MTC filed a joinder in the instant motion.

to the wrong venue, the action should be transferred to the appropriate division." Divisional venue in civil cases originally brought in federal district court is no longer mandated by 28 U.S.C. § 1393, repealed as part of the 1988 Judicial Improvements and Access to Justice Act. Similarly, the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi do not require divisional venue. However, venue is based on divisions within a district in actions removed from state court. 28 U.S.C. § 1441(a) provides in part:

...any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States **for the district and division embracing the place where such action is pending....**

(Emphasis added.) 28 U.S.C. § 1446(a) entitled "Procedure for removal," provides in part:

A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court **shall file in the district court of the United States for the district and division within which such action is pending a notice of removal....**

(Emphasis added.)

The style heading on the notice of removal designates the Western Division. The docketing clerk crossed out the word Western and substituted the word Delta. The court finds that the court clerk amended the notice of removal without authority to do so. It is statutorily mandated that venue of a removed action is based not only on the district but also the division in which such

action is pending in state court. See 28 U.S.C. §§ 1441(a) and 1446(a). Since removal to an improper venue is a defect in removal procedure, it may not be raised sua sponte by the court and may be waived by the plaintiff. In re Allstate Ins. Co., 8 F.3d 219, 223 (5th Cir. 1993); In re Shell Oil Co., 932 F.2d 1518, 1523 (5th Cir. 1991), cert. denied, 502 U.S. 1049, 116 L. Ed. 2d 814 (1992). 28 U.S.C. § 1447(c) provides that the plaintiff must move to remand "on the basis of any defect in removal procedure" within 30 days after the notice of removal is filed. Therefore, the plaintiff has a statutory right to assert a procedural defect within a prescribed period as grounds for remand. In this cause the plaintiff timely moved to remand. It is the removing defendant who is required to file the notice of removal in the appropriate district and division, pursuant to the express language of the removal statutes. If the court clerk were allowed to cure the defect by unilaterally amending the notice of removal, then the plaintiff would in effect be precluded from exercising his statutory right.

Upon due consideration, the court finds that the motion to remand should be granted on the ground that defendant Kroger removed this cause to an improper venue.<sup>2</sup> An order will issue accordingly.

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<sup>2</sup>The court need not address the other grounds raised by the plaintiff.

**THIS**, the \_\_\_\_\_ day of April, 1997.

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**NEAL B. BIGGERS, JR**  
**UNITED STATES DISTRICT JUDGE**